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Report: Legal advice on three proposed models for reforming the law on the sale or transfer of crofts

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¹ This academic opinion is provided by Stephen Tierney in a personal capacity and not from, or on behalf of, the University of Edinburgh. Since he does not carry professional liability insurance, Stephen Tierney's opinion can be offered on a without liability basis only.

Executive Summary

I was asked to address three proposed Models for the reform of crofting law, addressing the compatibility of each with human rights law in Scotland.

My findings are that all three Models, if constructed with due care, should be able to withstand any legal challenge based upon human rights law – the detailed consideration of these points is set out in Parts 5 and 6.

In Part 6 I set out recommendations for how the Models should be further developed or articulated in order to show that the Committee has taken possible human rights implications fully into account, and thereby to minimise the risk of successful human rights challenge.

There is one possible exception to what I take to be the general compatibility of these Models, even once carefully tailored. This concerns the preference for incoming crofters under 40 years of age in the eligibility for CHGS (grants). There is some doubt here as the compatibility of this measure with Convention rights. This is discussed at Part 5.4.2 and 6.5

Part 1. Background to Instruction

1.1 Instruction

To offer advice and general guidance as follows:

- On the framework of human rights law in Scotland
- On the specific nature of the right to property under the European Convention on Human Rights
- On the compatibility of the three Models (1.2 and 1.3) with human rights law in Scotland

1.2. The Models

The three Models are varying scenarios for the reform of crofting law, as discussed by Stephen Tierney with members of the Committee of 12 November 2007. The Models are set out in full in **Appendix 3** and summarised below at 1.3.

1.3 Summary of the Models

Model 1: The locally elected body

‘Under this Model, sales and non-family assignments must pass through a locally elected body (CRB) which buys the croft or croft tenancy from the outgoing crofter and sells it on to a preferred purchaser. The purchaser is selected by staff from a list of people who have expressed an interest in acquiring a croft, according to a set of criteria agreed by the elected members...’

Model 2: ‘The dampened market’

‘Under this Model, the market would operate freely, but legislative changes and tighter regulations would take the speculative element out of the market, thereby dampening it.

The facility to decroft would be tightly restricted, croft houses would have to be occupied and crofts worked. Crofts would be a minimum size to maintain the

connection to working the land, and sub-divisions would only be permitted every ten years. Without the possibility of decrofting the speculative element of the market would largely be removed and it is envisaged that with tighter regulations on the habitation and use of crofts there would be less interest in acquiring crofts and the market could therefore be dampened.’

Model 3: ‘A restricted market’

‘Under this Model, crofts exchange hands through a restricted market, in which only approved prospective purchasers can bid for assignments or ownership. Under this Model, there would be either a local body or a centralised body, which would approve or reject prospective purchasers, but it would be a broker between seller and buyer rather than taking ownership of properties between transactions. This might remain susceptible to ‘cash under the table’. It would need to have transparent criteria on which basis prospective purchasers are rejected or approved, and there would probably need to be a right of appeal.’

1.4 Summary of principal legal issues (see also Part 5)

In respect of any proposed legislation to be considered by the Scottish Parliament that will regulate private property, or any act by a public authority such as the Crofters Commission, CRB or Land Court relating to the regulation of property, there are six questions that need to be asked:

- (1) Is there an identifiable property right, or possession, in terms of Article 1?
- (2) Has this been interfered with?
- (3) Does the interference concern peaceful enjoyment of property, deprivation or control of use?
- (4) Is the interference prescribed by law?
- (5) Does the interference have a legitimate aim that is in the public or general interest?
- (6) Is the interference necessary in a democratic society which includes the question, is it proportionate?

These six questions will be used to address each of the three Models in Part 5.

Two other issues will be dealt with in Parts 5.4.1 and 5.4.2:

The power of transfer of the croft to a new tenant in the event of breach of requirements to work the croft and/or to reside on it. This power exists under current law and, as I understand the proposals, would continue to be available under all three Models – 5.4.1

The proposal under Model 1 that would favour incoming crofters aged under 40 for enhanced levels of CHGS to build an additional house for their own occupancy – 5.4.2

Other Convention rights will be referred to where relevant.

Part 2. Framework of the Report

- Background to human rights law in Scotland – Part 3

- The right to property under the European Convention on Human Rights – Parts **4.1 and 4.2**
- Permissible interference by the State with the right to property – Part **4.3**
- The compatibility of the three Models (**1.2 and Appendix**) with human rights law - Part **5**
- Clarifications and modifications that should be made in respect of current plans to minimise the risk of a successful legal challenge on human rights grounds - Part **6**

Part 3. Background to human rights law in Scotland

In this part I will explain the status of the European Convention in Scots law, highlighting how Convention rights have effect in our legal system, creating obligations for ‘public authorities’ and constraining the powers of the Scottish Parliament and Executive.

The Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights (‘the ECHR’), was adopted in 1950, and signed and ratified by the United Kingdom in 1953. It has the status of a binding international agreement, enshrining fundamental civil and political rights, and requiring Contracting Parties (States) to secure these rights to everyone within their jurisdiction,² and to ensure that everyone whose Convention rights are violated has an effective remedy.³

Until the coming into force of the Scotland Act 1998 and Human Rights Act 1998, the ECHR was not directly applicable in the courts of Scotland and persons who claimed violation of their Convention rights were required to take a case to the European Court of Human Rights in Strasbourg. The ECHR is now directly applicable in Scottish courts through both of these Acts. However, the avenue of application to the European Court of Human Rights remains if a party is dissatisfied with the outcome of the domestic legal process.

The rights contained within the ECHR which will be considered in this report are:

- The right to enjoyment of possessions;⁴
- the right to home;⁵
- freedom from discrimination;⁶ and
- fair process when public authorities make decisions that determine people’s civil rights.⁷

² Article 1 ECHR.

³ Article 13 ECHR.

⁴ Article 1 of Protocol No. 1 ECHR. Part 4 below. A provision based upon, and hence very similar to, Article 1 of Protocol 1 is to be found in Article 17 of the European Union Charter of Fundamental Rights, the status of which is yet to be determined. However, for future reference, this could become significant depending upon the outcome of current negotiations on the Reform Treaty. We might anticipate that the approach to the right to property taken under EU law, both by the Court of Justice and by domestic courts, will be similar to that taken by the European Court of Human Rights given the similarity in terms between Article 1 of Protocol 1 ECHR and Article 17 of the EU Charter of Rights, but we should be aware that differences in approach might develop over time.

⁵ Article 8 ECHR: ‘Everyone has the right to respect for his private and family life... [and] his home’.

⁶ Article 14 ECHR.

3.1 Scotland Act 1998

The Scotland Act imposes restrictions upon the Scottish Executive and the Scottish Parliament in relation to ECHR rights, as follows:

3.1.1. *Scottish Executive*: A member of the Scottish Executive has no power to make subordinate legislation, or to do any other act, that would be incompatible with ECHR rights.⁸

3.1.2 *Scottish Parliament*: Any Act, or any provision within an Act, of the Scottish Parliament that is incompatible with any Convention right is not law and can be struck down by the courts.⁹ There are also extensive procedural mechanisms within the Scotland Act to prevent the passage of such incompatible legislation.¹⁰ Therefore, the proposed Crofting Reform (Scotland) Bill, like any piece of proposed legislation, must be fully compatible with Convention rights contained in the ECHR.

3.2 Human Rights Act 1998

The Human Rights Act imposes obligations more broadly upon any ‘public authority’. It provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.¹¹ The term ‘public authority’ is cast widely in the Act¹² and has been interpreted broadly by the courts. It is clear that it includes the Crofters Commission, the Land Court,¹³ and would almost certainly include the locally elected body (CRB) proposed under Model 1.

Therefore, in their dealings under a new Act all of these bodies, in their roles as buyer, seller, transferor of crofts, appeal body or in any act in an official capacity, would be required to act compatibly with Convention rights.

Interpretation

It has been widely anticipated that domestic courts would take an approach almost identical to that of the European Court of Human Rights in interpreting Convention rights. This has generally been the case. However, courts in Scotland are required only to ‘take account’ of Strasbourg case law, rather than to follow it.¹⁴ **An important caveat is that the advice which follows is based upon how the European Court of Human Rights has interpreted the relevant articles of the ECHR. There is no guarantee that Scottish courts will adopt an identical approach. They may in certain cases subject interference with the right to property and other rights to more rigorous scrutiny than that adopted by the European Court of Human Rights.**

⁷ Article 6 ECHR: guarantees a right to a fair and public hearing by an independent and impartial tribunal established by law for purposes of the determination of civil rights and obligations.

⁸ Scotland Act, section 57(2).

⁹ Scotland Act, section 29(2)(d).

¹⁰ Scotland Act, esp. sections 30-35.

¹¹ Human Rights Act, section 6. Article 1 of Protocol 1 is included in the definition of ‘Convention rights’ as set out in the HRA: section 1(1)(b).

¹² Human Rights Act, section 6(3)(a).

¹³ Human Rights Act, section 6(3) specifically includes courts or tribunals in its definition of “public authority”.

¹⁴ Human Rights Act, section 2.

Part 4 Right to Property under the ECHR

The European Convention on Human Rights guarantees the right to property or, more specifically, the right of every person ‘to the peaceful enjoyment of his possessions’:
Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*¹⁵

This section will address three elements of Article 1 of Protocol No. 1:

- Scope of the right to property
- Content of the right to property
- Permissible restrictions to the right to property

These will be addressed in turn with particular focus on the issues relevant to the proposed Models for crofting law.

4.1 Scope of the right to property: what does the right cover and who does it affect?

4.1.1 What does the right cover?

4.1.1.1 Possessions embraces ‘property’. The notion of ‘possessions’ has been extended by the European Court of Human Rights to encompass in effect a broader right to property itself.¹⁶ This clearly includes heritable property.

4.1.1.2 Existing possessions, but not the right to acquire property. The right generally applies only to existing possessions and ‘does not guarantee the right to acquire possessions’.¹⁷ For the purposes of crofting law, and the Models proposed under the present proposals, only an existing owner or, possibly a tenant, would have rights under Article 1. In particular, it would seem that a prospective purchaser could not claim any right to property under the Article.

It will also be noted in **6.1.1.2** that while a prospective purchaser has no right of property, it will still be important that he be accorded fair treatment in any process of sale organised by a public authority, such as the proposed CRB, in order that his Article 6 rights are respected, and to preclude the possibility of a judicial review on the grounds of natural justice.

4.1.1.3 The right to property includes the right to dispose of property

¹⁵ Article 1 of Protocol No. 1 ECHR.

¹⁶ ‘Article 1 is in substance guaranteeing the right of property.’ *Marckx v. Belgium* (1979) Application no. 6833/74.

¹⁷ *Marckx v. Belgium*. For example, an expectation to inherit in future is not covered.

The European Court of Human Rights has confirmed: ‘the right to dispose of one’s property constitutes a traditional and fundamental aspect of the right of property.’¹⁸ Clearly this is potentially relevant to all three Models, in particular Model 1 and to a lesser extent Model 3. The potential significance of this right for each Model will be considered in Parts **5.1.(2)**, **5.1.(3)**, **5.2.(2)**, **5.2.(3)**, **5.3.(2)**, **5.3.(3)**.

4.1.2 Who has a right to property?

4.1.2.1 Any legal person. The right belongs to any ‘legal person’, meaning both individuals and corporate persons, such as companies or partnerships. It can also include a landlord’s entitlement to rent.

4.1.2.2 Tenants. The right to property may in certain circumstances also include a tenant’s interest in a tenancy.¹⁹ For example, a tenancy that is also a business could be considered to be a possession.²⁰ Since crofts are working farms it seems safer to assume that crofting tenants do have rights under Article 1 of Protocol No. 1.

4.1.2.3 Only victims can bring a claim. To bring a Convention claim against a public authority under the HRA one must be a ‘victim’ of an unlawful act; in other words, show a connection between oneself and the violation by a public authority.²¹ This means that a person who seeks to bring a challenge must show he personally has been adversely affected. Clearly a property owner would meet this test of sufficiency of interest, as potentially might a tenant, provided the tenancy is deemed to be a ‘possession’ for the purposes of Article 1 of Protocol 1. As discussed, a person seeking to acquire property but unable to do so would not seem to meet any victim test, unless under Article 6 there is a failure of due process to which such a person might claim a legitimate entitlement **4.1.1.2** (see also **5.4.2** and **6.1.1.2**).

Since Article 1 of Protocol No. 1 refers to the rights of ‘legal persons’ (Part **4.1.2.1**), the concept of ‘victim’ could extend to companies or partnerships with a proprietary interest in a particular piece of land.

4.1.3 Who has duties?: ‘public authorities’

Under the HRA only ‘public authorities’ have a duty to act compatibly with Convention rights. In other words, individuals or other private parties do not have obligations under the Act. As discussed above, it seems clear that bodies such as the Crofters Commission and the Land Court are, and the proposed CRB would be, public authorities.

4.1.4 Negative and positive obligations

The right to property under Article 1 of Protocol No. 1 embraces negative and positive obligations on the part of the state. A positive obligation is where the State is required actively to intervene to protect property rights. Such a scenario does not seem relevant to this paper. Instead we are concerned with the State’s negative obligations, whereby Article 1 of Protocol No. 1 protects a person from unjustified interference by the State with the peaceful enjoyment of his possessions. In Parts **5**

¹⁸ *Marckx v. Belgium*. In fact this is specifically referred to in Article 17 of the EU Charter of Rights.

¹⁹ *Iatridis v. Greece* (1999) App. no. 00031107/96.

²⁰ *Traktor Aktiebolag v Sweden* (1991) 13 E.H.R.R. 97.

²¹ Human Rights Act 1998 section 7(1).

and 6 I will consider whether any element of the three Models might be said to constitute an unjustified interference with a person's property rights.

4.2 Content of the Right to Property

There are three elements to the content of the right contained within Article 1 of Protocol No. 1 as articulated by the European Court of Human Rights:

- peaceful enjoyment of possessions **4.2.1**;
- protection from unlawful deprivation **4.2.2**;
- and the discretion on the part of the state to exercise control over property **4.2.3**.²²

The European Court tends to look first to see whether there has been a deprivation of property rights or control of use since these are more specific issues, before looking at the broader category for possible interference with peaceful enjoyment of possessions. However, I will address this broader, umbrella issue first since it is something of a 'catch all', covering interferences with property rights not caught by the other two issues, and because it is potentially relevant, particularly to Model 1.

4.2.1 Peaceful enjoyment of possession

The right to peaceful enjoyment of possessions can manifest itself in various ways, but for our purposes, most relevantly, it has been found by the European Court of Human Rights to include protection against the unlawful expropriation of property and the effects of unlawful planning restrictions. Another point that may be some significance is that it can also extend to cover rent controls.

As mentioned in the section on 'Scope' above **4.1.1.3**, the right to dispose of property is also included under the general umbrella notion of enjoyment of possessions. This freedom to dispose will be a key concern in Part **5**, particularly in relation to Models 1 and 3.

4.2.2 Deprivation of possessions

Article 1 also covers situations where individuals are deprived of their property by the State. Article 1 subjects such deprivation to certain conditions.²³ When such a complaint is made the two crucial issues of fact are whether and to what extent property rights have been extinguished. The Court in *Sporrong and Lönnroth v. Sweden* made clear that there is a distinction between actual appropriation/deprivation of property, and measures that merely regulate the use or disposal of property.

In **5.1.(2)** I will discuss whether regulating the sale of property in Models 1 and 3 could possibly amount to expropriation (note also **5.2.(3)**).

In the three Models we are addressing there is also provision for transfer of the croft to a new tenant in respect of crofts that are not worked or where the tenant is absent.

²² *Sporrong and Lönnroth v. Sweden* (1982) Series A No. 52.: 'The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph'.

²³ *Sporrong and Lönnroth v. Sweden*.

This would clearly have the potential to constitute deprivation of possessions, and again the implications of this will be addressed in **5.4.1** and **6.4**.

In general, the State is entitled to deprive individuals of property belonging to them if this is in the public interest and legally regulated. The European Court has expected compensation to be paid where property is taken.²⁴ Issues that will be returned to in relation to deprivation in **5.4.1** and **6.4**, therefore, are public interest and proper legal regulation.

4.2.3 Control

States are entitled to control the use of property in the ‘general interest’, and can enact laws to do so.

The European Court of Human Rights has regularly found that restrictions or control of use by the State are permissible. One area where this is the case is control of the powers of landlords. For example, the Court has found it permissible for a State to impose rent restrictions.²⁵ Another common example is to be found in planning laws: States frequently impose restrictions on use of property either directly or indirectly through planning law and such restrictions on use have regularly been found to be perfectly valid by the European Court of Human Rights.²⁶

Therefore, although arbitrary interference by the State with a person’s possessions can violate Article 1 of Protocol No. 1, the State is clearly permitted to control the use of property. Control of use is clearly present in the Models under discussion, given that in each there are either attempts to control transfer to those who will use the property in a particular way (Models 1 and 3) or tighter regulations on the habitation and use of crofts (Model 2). In general, the threat of transfer of the croft to a new tenant when sitting tenants fail to reside on the croft and work the land also constitutes control of use. Therefore, this issue will be returned to in **5.4.1** and **6.4**.

4.3. Permissible interference by the state with the right to property

Even when a *prima facie* interference with a property right is found under Article 1 of Protocol No. 1, it is very possible that this is permissible and does not violate the Article.

In fact, the provision within Article 1 of Protocol No. 1 that permits restrictions is interpreted broadly by the European Court, with States being accorded what is known as a ‘margin of appreciation’ in fairly wide terms. The doctrine of ‘margin of appreciation’ is designed to give States a measure of discretion in questions that are deemed particularly sensitive. In other words, the European Court prefers to leave States with considerable discretion when determining when and how to interfere with property rights in the public or general interest; a judgement to be based upon the State’s own society, culture, economic system etc. Indeed the regulation of property rights is deemed to be one where the State’s discretion is particularly wide since the

²⁴ *Holy Monasteries v. Greece* (1995) 20 EHRR 1.

²⁵ *Mellacher and others v. Austria* (1990) 12 E.H.R.R. (CD) 97: it was permissible for a state to set lower rent limits for private tenants. Tenancy cases often involve control of use: e.g. a landlord’s power to remove tenants can properly be restricted by the state: *Scollo v Italy*. (1996) 22 E.H.R.R. 514.

²⁶ *Chapman v UK* [2001] 33 E.H.R.R. 18.

ECHR seeks to leave States with broad discretion in economic matters. Another reason for this extensive discretion is that a wider margin of appreciation is seen as appropriate in respect of those rights which are deemed to be less fundamental within the ECHR catalogue. Property rights are not treated as being as crucial as other rights such as life, freedom from torture or right to a fair trial, where State discretion is strictly limited.

Although the Court has read into Article 1 of Protocol No. 1 a considerable area of discretion for a State to restrict property rights in what it deems to be the ‘general interest’, there are limits **4.3.1**.

4.3.1 How must these restrictions operate?

As is common with Convention rights, there are three conditions that a state must satisfy in order to justify a restriction with the right to peaceful enjoyment of possessions.

Such a restriction must be:

- *prescribed by law* **4.3.1.1**, and
- *in pursuit of a legitimate aim* – (in the case of Article 1 of Protocol No. 1 this means the restriction must be in ‘the general interest’ or ‘the public interest’) **4.3.1.2**, and
- *necessary in a democratic society* **4.3.1.3**.

If any of these conditions are not satisfied then there is a violation of the ECHR.

4.3.1.1. Restrictions must be *prescribed by law*

Enjoyment of possessions is ‘subject to conditions provided for by law’.²⁷ This means any interference must be lawful rather than arbitrary, in order that the restrictions to which a citizen is subject are clear to him. The principle that a legitimate interference may only be effected by clear and certain legal provisions is a more general requirement running through the ECHR as a whole, as interpreted in the jurisprudence of the European Court: the interfering measure must be accessible to the citizen and its precise scope should be clear.²⁸ This provision links to process requirements under Article 6 which require that public authorities, in making determinations that affect individual rights, do so with regard to proper due process.

So important is the provision of a proper legal procedure in any interference with property rights that such a procedure can, it seems, operate to prevent a finding of a violation even when the necessity of an interference falls into question.²⁹

²⁷ Article 1 of Protocol No. 1.

²⁸ *Sunday Times v UK* (1979) A30, para 49.

²⁹ In *Hentrich v France* [1994] ECHR 29 a measure that was considered ‘an individual and excessive burden’ also involved a procedure that operated in an arbitrary way and which was not properly foreseeable. However, the Court found that the individual and excessive burden borne by the victim ‘could possibly have been rendered legitimate if she had had the possibility – which was refused to her – of effectively challenging the measure taken against her. The fair balance which should be struck between the protection of the right of property and the requirements of the general interest was therefore upset.’

4.3.1.2 Restrictions to the right must be in pursuit of a *legitimate aim*

Provided that the legal regime governing a restriction of the right to property is adequate, the state must next show that the restriction is in pursuit of a legitimate aim.

In relation to Article 1 of Protocol No. 1 this means that interference must be in the ‘general interest’ or ‘public interest’. In terms of the general principle of enjoyment of possessions, this can only be interfered with in the ‘general interest’. Similarly, Article 1 of Protocol No. 1 specifically provides that the State might also control the use of property only in accordance with the ‘general interest’. Whereas in terms of the third content issue discussed above: no-one shall be deprived of his possessions except in the ‘*public interest*’.

These are quite vague tests and the Court will read the terms ‘general interest’ and ‘public interest’ largely interchangeably. What is more, it reads them in a broad way allowing a State considerable discretion in determining what it considers to be in the public or general interest. The Court will generally not second guess the exercise of this discretion unless the State’s judgment ‘is manifestly without reasonable foundation.’³⁰

In Part **5.1.(5)** I will return to the specific aims put forward for the proposed legislation.

4.1.1.3 Restrictions to the right must be *necessary in a democratic society*

If there is a *prima facie* interference with the peaceful enjoyment of possessions, deprivation of property, or potentially unlawful exercise of control, then such restrictions must be necessary in a democratic society. Again this is a general test that we find throughout the ECHR. In other words, even if a legal restriction is prescribed by law and pursues a legitimate aim that is in the general or public interest, the measure adopted must also be necessary to achieve that aim. This can also be cast in terms of a balancing exercise where the general interest or public interest must be weighed against the fundamental rights of the individual. The European Court of Human Rights has found that such a fair balance will not have been struck where the individual property owner is made to bear ‘an individual and excessive burden’.³¹

However, as has been noted, the Court has generally given States a fairly wide level of discretion (margin of appreciation). We see this when we consider the question of proportionality. With many Convention rights the Court will only interpret an interference as being necessary where the measure taken is the least restrictive necessary to achieve the purpose. With the right to property, however, a state has greater leeway. As a recent handbook commissioned by the Council of Europe puts it: ‘the Court leaves the Contracting States certain discretion commonly referred to as “margin of appreciation”, considering the state authorities to be better placed to assess the existence of both the need and the necessity of the restriction, given their direct contact with the social process forming their country. For this reason, there will in principle be no violation of the Convention should there exist another measure less

³⁰ *James v. UK* (1986) 8 E.H.R.R. 123.

³¹ *Sporrong and Lonnroth v Sweden*.

restrictive to a Convention right than the one chosen in achieving a certain aim, as long as both measures fall within the State's margin of appreciation.'³²

Although proportionality is not as intensely policed in respect of property rights as it is in other areas, that does not mean that proportionality is irrelevant. As the handbook also observes: 'On the other hand, the Court shall certainly take into consideration the existence of alternative solutions when ruling whether interference had been proportionate to the aim sought to be achieved.'³³ In restricting property rights, therefore, the state should be mindful of the level of interference being imposed and whether there was an alternative, less restrictive approach, which could reasonably have been taken and which would also have achieved the aim sought. Issues to be considered in relation to Model 1 in particular will be addressed in Part 6.

However, the generally wide recognition of the wide area of discretion that should be available to states to regulate property rights in the public interest seems to recognise the European tradition of social democracy which considers property rights to be open to reasonable restriction in pursuit of important policy goals. See discussion of *James v UK*³⁴ etc at 5.1.(5).

The issue of 'necessity' is considered in relation to Models 1-3 at 5.1.(6), 5.2.(6), 5.3.(6) and 6.

Part 5. The compatibility of the three Models (1.2 and Appendix) with human rights law in Scotland

From Parts 1-4 it is clear that whenever we assess any piece of legislation to be passed by the Scottish Parliament or any act by a public authority such as the Crofters Commission, CRB or Land Court relating to the regulation of property, there are six questions that need to be asked:

- (1) Is there an identifiable property right, or possession, in terms of Article 1?
- (2) Has this been interfered with?
- (3) Does the interference concern peaceful enjoyment of property, deprivation or control of use?
- (4) Is the interference prescribed by law?
- (5) Does the interference have a legitimate aim that is in the public or general interest?
- (6) Is the interference necessary in a democratic society which includes the question, is it proportionate, striking a fair balance between the interests of the community and the fundamental rights of the individual?

I will now review the three Models in light of these 6 questions, applying the law as set out in Parts 1-4.

Two other issues will be dealt with at the end of Part 5 at 5.4:

³² 'The right to property under the European Convention on Human Rights', Council of Europe Human Rights Handbooks, No. 10, p14.

³³ See also *James v UK* para. 46.

³⁴ Op. cit.

The power of transfer of the croft to a new tenant in event of breach of requirements to work the croft and to reside on it, which exists under current law and would continue to be available under all three Models **5.4.1**.

The proposal under Model 1 that would favour incoming crofters aged under 40 for enhanced levels of CHGS to build an additional house for their own occupancy **5.4.2**.

5.1 Model 1

According to the instruction I received, in Model 1: ‘sales and non-family assignments must pass through a locally elected body (CRB) which buys the croft or croft tenancy from the outgoing crofter and sells it on to a preferred purchaser. The purchaser is selected by staff from a list of people who have expressed an interest in acquiring a croft, according to a set of criteria agreed by the elected members... The price would be set by the district valuer, based on the market value of the house and the agricultural value of the land or, for a tenancy, on the tenant’s improvements (essentially the resumption price) – all subject to crofting regulation.’

5.1.(1) Is there an identifiable property right, or possession, in terms of Article 1?

The existing tenant, ‘seller’ in this scenario, seems clearly to have a property right. Although the position regarding tenants under Article 1 is somewhat unclear, the power to sell a tenancy in this manner seems clearly to be a proprietary interest.

5.1.(2) Will it be interfered with by the new law?

It does seem that the power of the CRB could be construed as a restriction on the free right of the owner to dispose of the property as he sees fit.

There could be some debate about whether the power of the CRB to buy is in effect a power to confiscate property (thereby depriving a person of his property), but it is highly unlikely that this power could be construed as confiscation since the CRB would only be in a position to buy the croft when the seller is willing to sell.

Certainly the European Court has shown itself prepared to look behind formalism at the real effect of restrictions. ‘In the absence of formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of ... Since the Convention is intended to guarantee rights that are “practical and effective” ..., it has to be ascertained whether that situation amounted to a de facto expropriation’³⁵. In this case the State had created expropriation permits but even so these were not found to amount to de facto confiscation. The existence of expropriation permits resulted in the reduction of the selling price of the property at issue. However, the applicants had never ceased to be the owners of the property and they could at all times sell it if they wished to do so. Therefore, since the owners retained the power to sell, the European Court in *Sporrong and Lönnroth v Sweden* did not find any deprivation of property.

It seems, therefore, that the powers of the CRB would also not be construed as a confiscation power. Here the owners would only cease to be owners if they chose to

³⁵ *Sporrong and Lönnroth v Sweden*.

sell. Although the CRB will control the process of a sale to a third party, the seller needn't sell if he doesn't wish to, and the proceeds of the sale will go to the seller.

Therefore, the power of the CRB will be construed as a restriction on the free right of the owner to dispose of the property as he sees fit **5.1.(3)**, and justifications that are needed to show that this power is necessary will be construed in this light. **5.1.(6)** and **6**

5.1.(3) Does the interference concern peaceful enjoyment of property, deprivation or control of use?

If there is interference it would seem to be interference concerning peaceful enjoyment of property. This can only be justified if necessary in the 'general interest'.

The next 3 questions concern whether the interference is permissible. All three need to be answered Yes or there will be a violation of Article 1 of Protocol No. 1.

5.1.(4) Is the interference prescribed by law?

Insofar as this aspect of Model 1 might be construed as a *prima facie* restriction of Article 1 of Protocol No. 1 then this restriction will clearly be prescribed by law through the new Act. This will establish a legal regime for the purchase and sale of property. There will also be a procedural system to regulate how a purchase by the CRB and a subsequent sale would operate case by case. As has been noted **4.3.1.1**, it is important that a fair and transparent process be created. I will return to this at question **5.1.(6)** and **6.1.1** below.

5.1.(5) Does the interference have a legitimate aim that is in the general interest?

In so far as there is a *prima facie* interference there are strong arguments that Model 1 (and indeed the other 2 Models) are designed to pursue a legitimate aim under the Protocol.

The Committee is in the best place to identify and explain the specific aims behind the proposed legislation but from my review of its terms of inquiry and its work to date these might be set out thus.

In terms of the remit given to the Committee of Inquiry by the Scottish Executive announced in September 2006, the Committee is to identify a vision for the future of crofting in contributing to:

- sustaining and enhancing the population;
- improving economic vitality;
- safeguarding landscape and biodiversity; and
- sustaining cultural diversity.

The following are cast as key issues:

- the economic contribution of crofter agriculture to the local economy, and the significance of current public support in that contribution;
- the extent to which occupiers of small farms and crofts generate income from sources other than primary agricultural production, and the availability of financial assistance to encourage that;

- the demand for, and availability of, affordable housing generally in the crofting counties, and the role of croft house grants in contributing to local housing supply; and
- the market for crofts, in particular their availability for young people and new entrants.

The proposed Models seem part of a clear strategy to deal with a particular problem that is harming an identifiable community. The immediate aim is to regulate the transfer of crofts or the working and residential conditions of possession of a croft. The reason for this legislation is that the free market, left unregulated, is damaging crofting as a way of life. In consequence of current property values there is considerable speculation in crofts, which is leading to the transfer of crofting land to people who do not intend to work the croft, which in turn undermines crofting as a way of life for an identifiable community and hence the integrity of the crofting community itself.

Therefore, a summary of the broader aims and objectives for the different forms of regulation contained in Models 1-3 seems to include:

1. to protect crofting as a way of life that is vital to the community and has been built up as part of rural life in the Highlands and Islands over many years.
2. to take the speculative element out of croft assignments.
3. to ensure land continues to contribute to the community.

To that end it is essential to ensure that:

1. land is being worked according to the crofting tradition.
2. tenants are resident on crofts.

As is clear from Part 4, a State has wide discretion to identify and pursue such aims. The European Court would be very unlikely to second guess the judgement of a State that protecting a traditional way of life or intervention in the field of property regulation to promote important social goals is a matter of general interest.³⁶

In the important case of *James v UK* the Leasehold Reform Act 1967, gave long leaseholders in England the right to buy the freehold in their tenancy below market value. One large freeholder claimed this cost him around £2 million compared to market value which was much higher than prices paid by leaseholders. He argued that the transfer of property from one person to another could not be ‘in the public interest’. The European Court found, however, that the compulsory transfer of property from one individual to another could be a legitimate aim in the public interest. Indeed a policy calculated to enhance social justice within the community could properly be considered to be in the public interest. What is more, the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, and the Court will accept the legislature’s judgment as to what is ‘in the public interest’ in such a context unless that judgment is ‘manifestly without reasonable foundation.’ Similarly in *Mellacher v Austria*³⁷ the Court found that an aim to make accommodation more easily available at reasonable prices could not be seen as manifestly unreasonable.

³⁶ *James v UK*.

³⁷ *Op. cit.*

Furthermore, one aim set out in the terms of inquiry is ‘safeguarding landscape and biodiversity’. The European Court has recognised that preservation of environment can be a legitimate aim that justifies certain interferences with property rights.³⁸

It is clear also that these aims presented by the Committee are moderated by a clear recognition also of the importance of the right of property. The way in which the aims are framed does not include any intention to introduce blanket bans preventing the sale or assignation of land. Indeed, the problem that has been identified by the Committee is not buying and selling, but decrofting. The various Models, therefore, can be explained in terms of maintaining the use of land as a croft, while seeking to interfere with private property rights in as restrictive a way as possible. In other words they should be presented as a careful attempt to balance the interests of the crofting community with those of individual property owners which will not impose ‘an individual and excessive burden’ on particular individuals.³⁹

5.1.(6) Is the interference necessary in a democratic society?

The task the Scottish Parliament faces in passing legislation that affects free disposal of property is to show why this is necessary in pursuit of the various aims out-lined above.

As has been observed in **4.1.1.3**, proportionality is not as significant an issue as it is with other rights due to the wide margin of appreciation that applies in relation to property regulation.⁴⁰ However, restrictions must still be cast in terms of a balancing exercise where the general interest or public interest must be weighed against the fundamental rights of the individual. For a balance to be fair the individual property owner should not be made to bear ‘an individual and excessive burden’.⁴¹

There are various ways in which the proportionality of this aspect of Model 1 can be demonstrated:

In the first place, the restriction will not be arbitrary but will apply by statute to a class of property owners. Therefore, no individual should be subjected to an individual and excessive burden. See recommendations at **6.1.1** and **6.1.4** below.

Secondly, this aspect of Model 1 is not a blanket ban on buying or selling, nor is it appropriation or even compulsory purchase. The method proposed - purchase by the CRB and then attempts to sell at market value – can be presented as a careful attempt to arrive at a proportionate response to the issue. In cases of confiscation/deprivation, the opportunity to claim compensation is important in showing the proportionality of the measure, even where the compensation does not meet market value. There is no confiscation proposed here, but efforts to effect a sale at market value will demonstrate a clear attempt to weigh the interests of the individual in the balance. But again the Model should develop detailed plans. See recommendations at **6.1.2** below.

³⁸ *Pine Valley Development v. Ireland*, ECHR Ser. A No. 222 (1991), paras 54 and 57.

³⁹ *Sporrong and Lonnroth v Sweden*.

⁴⁰ As has been noted even if a less restrictive Model could have been used the more restrictive is acceptable if it falls within this wide margin.

⁴¹ *Sporrong and Lonnroth*.

It has also been observed that in *James v UK*, when a policy is calculated to enhance social justice within the community, or is generally implementing social and economic policies, the European Court will accord a wide margin of appreciation. The Court will accept the legislature's judgment as to what is "in the public interest" unless that judgment is 'manifestly without reasonable foundation'.⁴²

If Model 1 is carefully constructed it should be able to show that the interference with property rights that it involves is not 'manifestly without reasonable foundation'. See recommendation at **6.1.1**.

In general the composition and process of the CRB will be important here **6.1.1**. Also the availability of an appeal mechanism is something that will help to demonstrate the proposal to be both properly prescribed by law and another example of a proportionate response that takes the owner's interests seriously. See recommendation at **6.1.4**.

5.2. Model 2

According to the instruction I received, in Model 2: 'Under this Model, the market would operate freely, but legislative changes and tighter regulations would take the speculative element out of the market, thereby dampening it. The facility to decroft would be tightly restricted, croft houses would have to be occupied and crofts worked. Crofts would be a minimum size to maintain the connection to working the land, and sub-divisions would only be permitted every ten years.'

5.2.(1) Is there an identifiable property right, or possession, in terms of Article 1?
Yes. See **5.1(1)**

5.2.(2) Would this be interfered with?

It seems there is *prima facie* interference since the State is exercising control over the use of the property.

5.2.(3) Does the interference concern peaceful enjoyment of property, deprivation or control of use?

Control of use.

5.2.(4) Is the interference prescribed by law?

Yes. Again a clear statutory regime will satisfy this point.

5.2.(5) Does the interference have a legitimate aim that is in the general interest?

In presenting the general interest the Committee can again point to the various aims set out above.

5.2.(6) Is the interference necessary in a democratic society?

Again the wide margin of appreciation is relevant here. It is well established that restrictions on use are permissible as set out in Part **4.2.3** above. State policies to control property especially in areas involving housing are seen by the European Court as issues of economic and social policy. The State has wide margin of appreciation

⁴² Also economic reform to achieve greater social justice may justify compensation for less than market value. *James v UK* para 54.

and the Court is reluctant to interfere unless the interference is manifestly without reasonable foundation.⁴³

Model 2 can be seen to be a clear attempt to arrive at a proportionate response to the issue. It does not prevent a seller from selling, nor does it confiscate property (the possibility of transfer of the croft to a new tenant by the Crofters Commission or another body in certain circumstances, which is included in all three Models, will be discussed separately below 5.4.1), but simply to restrict use in pursuit of important social goals. It seems highly unlikely that any court would consider Model 2 to be an interference with property rights that is manifestly without reasonable foundation.

5.3 Model 3

According to the instruction I received, in Model 3: ‘Under this Model, crofts exchange hands through a restricted market, in which only approved prospective purchasers can bid for assignments or ownership. Under this Model, there would be either a local body or a centralised body, which would approve or reject prospective purchasers, but it would be a broker between seller and buyer rather than taking ownership of properties between transactions...’

5.3.(1) Is there an identifiable property right, or possession, in terms of Article 1?

Yes. See 5.1.(1)

5.3.(2) Has this been interfered with?

Insofar as there is *prima facie* interference it would be along the lines of Model 1 since there are possible elements of interference with enjoyment of possessions in terms of restricting disposal. 5.1.(2)

5.3.(3) Does the interference concern peaceful enjoyment of property, deprivation or control of use?

I concluded in relation to Model 1 that it is very unlikely the powers of the CRB would also be construed as a confiscation power 5.1.(3). This is even less likely in Model 3 where property at no point passes to the CRB.

Therefore, insofar as there is any interference it is with peaceful enjoyment of property on grounds of interference with freedom to dispose of property.

5.3.(4) Is the interference prescribed by law?

The comments in relation to Model 1 apply. 5.1.(4)

5.3.(5) Does the interference have a legitimate aim that is in the public or general interest?

Again the Committee can point to the various aims set out above in relation to Model 1. 5.1.(5)

5.3.(6) Is the interference necessary in a democratic society?

I concluded that it is unlikely that Model 1 would be seen as manifestly without reasonable foundation if carefully constructed 5.1.(6). Model 3 would be even less likely to be seen as manifestly without reasonable foundation since there are further

⁴³ *James v UK* para 46; and *Scollo v Italy*.

attempts to limit interference with the owner's rights by not taking the property into the hands of the CRB.

Otherwise the comments in relation to Model 1, particularly those concerning establishing clear and fair processes, would also apply **5.1.(6)**.

5.4 Two other issues arising from Models 1-3

5.4.1 Power of transfer of the croft to a new tenant

Under section 22 of the Crofters (Scotland) Act 1993 the Crofters Commission has the power to intervene, and under certain conditions to bring about the transfer of the croft to a new tenant in certain circumstances, including where the tenant is not working the croft or where he is not resident within a particular distance of the croft. I understand that this power will remain, or will perhaps be strengthened, under the three Models.

5.4.1.(1) Is there an identifiable property right, or possession, in terms of Article 1?

It is unclear how far Article 1 accords rights to tenants, but the general probability that a tenancy may be seen as a form of proprietary interest was outlined above **5.1.(1)**. However, this property interest may be diminished where the croft is not being worked or where the tenant is absent.

5.4.1.(2) Has this been interfered with?

If a property right is identified, there is no doubt that transfer of the croft to a new tenant without the existing tenant's consent would constitute interference.

5.4.1.(3) Does the interference concern peaceful enjoyment of property; deprivation; or control of use?

It would seem clearly to involve deprivation if the tenant is removed. If the owner is also the tenant and the tenancy is to be re-let then this would seem to affect the owner's peaceful enjoyment of property.

5.4.1.(4) Is the interference prescribed by law?

Yes. This is already the case with existing statutory authority for the existing power; a continuation of a clear statutory regime would seem to satisfy this point.

5.4.1.(5) Does the interference have a legitimate aim that is in the general interest?

Again the aims set out in respect of Model 1 would also apply here. For example, those of sustaining cultural diversity and safeguarding landscape and biodiversity would seem to be particularly relevant, although the Committee is best placed to decide this.

5.4.1.(6) Is the interference necessary in a democratic society?

Again the same points concerning proportionality apply with the reminder that particular owners should not bear 'an individual and excessive burden'.

It is clear that there is a legitimate aim in the general interest of the community in maintaining crofting as a way of life. This is not possible if the crofts are not being

worked and, therefore, a residence and working requirement, in light of the wide margin of appreciation open to a State, would seem to be within the State's power. This power should be exercised with certain procedural safeguards, a number of which already operate under existing legislation. See recommendations at **6.4**.

One other issue potentially arises in relation to Article 8 ECHR which provides: 'Everyone has the right to respect for his private and family life, his home and his correspondence'. There is of course the scenario that certain tenants facing transfer of the croft to a new tenant will lose their homes. However, for those resident away from the croft this should not be an issue. In respect of those who do live on the croft, the transfer of the croft to a new tenant would again have to be shown to be necessary. A fairly wide margin of appreciation attaches to Article 8 although probably not as wide as that attaching to Article 1 of Protocol No.1. Again it seems that a strong argument can be made that transfer of the croft to a new tenant is not an unreasonable interference with the peaceful enjoyment of one's home when a condition of the tenancy is that the croft be worked.

5.4.2 Age-based prioritisation under Model 1

'Where the croft is assigned to a crofter aged under 40, the incoming crofter will be eligible for enhanced levels of CHGS to build an additional house for their own occupancy.'

This potentially raises a separate issue under Article 14 ECHR. Article 14 provides that the enjoyment of rights under the Convention shall be secured without discrimination on any ground.⁴⁴ Age is not specifically listed but may be taken as implied as such a ground.

It is not clear, however, that any property right here would be violated. There seems to be no property right as such, since the anticipation of acquiring property is not within the scope of Article 1 of Protocol No. 1 – **4.1.1.2** above. Therefore, the anticipation of a discretionary grant would be unlikely to be construed as a right. However, where a person has been refused a grant and others have been awarded grants based on their age, there is a danger that the person who does not get the grant could raise a judicial review action claiming such a decision to be unreasonable with Article 14 invoked as one of the grounds.

5.4.2.1 Would such a measure be *prescribed by law*?

If provided for in the Act or in secondary legislation, yes it would be.

5.4.2.2 Would it pursue a *legitimate aim*?

There seem to be several aims here. First the aim set out in the remit given to the Committee of Inquiry concerning sustaining and enhancing the population. It also relates to other key issues for the Committee: the demand for, and availability of affordable housing generally in the crofting counties, and the role of croft house grants in contributing to local housing supply; and the market for crofts, in particular their availability for young people and new entrants. See recommendation at **6.5.1**.

⁴⁴ Article 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Although we should note the Court's reluctance to second guess a State's determination of the public interest or general interest when it comes to property restriction, this would be likely to differ in respect of a possible discrimination issue.

5.4.2.3 Would such a measure be *necessary in a democratic society*?

In cases of discrimination the approach of the European Court has typically been to assume that this is unnecessary unless the State can show that it is. The Court has also tended not to accord a wide margin of appreciation here.

The UK has recently passed the Equality Act 2006. This does not outlaw age discrimination in the provision of goods and services, but the newly created Commission on Equality and Human Rights (CEHR) will be responsible for tackling all forms of discrimination and ensuring all equality laws are enforced. It is anticipated that new law will in due course be passed that may outlaw discrimination on the grounds of age in the provision of goods and services.

See recommendation 6.5.2.

Part 6. Clarifications/modifications that should be considered in respect of current plans

6.1 Model 1 recommendations

The plan for how Model 1 will operate does not seem to be very detailed as yet. This could be developed and issues that might be addressed in order to minimise the risk of a successful legal challenge on human rights grounds include the following:

6.1.1 Model 1 – Good process, the composition of the CRB etc.

In terms of constructing Model 1 the issue of process will be very important⁴⁵. Model 1 sets out the proposal for process as follows: 'Former local authority district and island authorities, or similar, might be an appropriate level at which the CRB would sit, and there would be a higher authority (possibly a small Crofters Commission or the Land Court) to which appeals on procedural grounds only would go.'

There seem to be two important stages in the proposed process: that by which the property is purchased by the CRB and sold on; and that by which appeals can be brought. Recommendations in respect of the former will be offered here at **6.1.1.1-6.1.1.5**. The issue of appeal will be returned to at **6.1.3**.

6.1.1.1 It is essential in relation to Article 1 of Protocol 1 that the operation of the power by the CRB to buy land and sell it on is exercised fairly and in a non-arbitrary manner. It should apply openly and transparently to all tenants and in respect of all prospective purchasers. In any process tenants should be treated alike as a class of property rights-holders, so that as far as possible it is ensured that none bear 'an individual and excessive burden'.

6.1.1.2 The creation of a fair and transparent process is important also in determining that the interference is prescribed by law. Such a Model should satisfy public law

⁴⁵ *Hentrich v France*.

rules since decisions made by the CRB will be open to potential judicial review challenges on normal public law grounds such as natural justice as well as on the grounds of a violation of human rights under the HRA.

In this respect, natural justice can require a fair hearing for all interested parties. The Committee should consider whether, and if so how, there should also be an opportunity for the seller to make representations to the CRB if he feels the price being offered is unfair, or on other grounds. Interestingly, a prospective buyer, although himself possessed of no Article 1 rights since the prospect of acquiring property is not itself a property right, could have a right to a fair process in any purchasing process organised by the CRB. No existing possession or even legitimate expectation of possession is needed to attract the guarantees of Article 6 or of public law rules concerning fairness to interested parties.

6.1.1.3 Natural justice also requires that a decision-maker acts impartially. There should be efforts made to reduce the risk of bias, since the possibility of conflict of interest can be greater in small communities. The composition of the CRB will be important. The Committee should reflect upon the method and transparency of its composition to ensure as far as possible that it is widely seen as a legitimate body, able to make decisions on the transfer of property in a fair way.

6.1.1.4 Following from 6.1.1.3, detailed consideration should be given as to how the list of potential buyers will be drawn up; what the criteria will be in determining who constitutes a suitable purchaser; whether the Crofters Commission's approval for an assignation will be needed following a decision by the CRB; whether the purchase price a prospective buyer offers to pay will be a criterion of suitability etc. - See **6.1.2**.

6.1.1.5 One other issue might be the efficiency with which the process is expedited under Model 1. For example, if a sale took so long to organise to the point where the market value fell that could possibly be an issue that shows a weakness in the process challengeable under judicial review.

6.1.2 Sales and market value

It seems important to make clear how attempts to find market value will be arrived at, in particular the role of the District Valuer or other body in arriving at the market value.

Also it seems to be important to make clear how sales will seek to arrive at the best price achievable: if market value is not offered by those on the list, will the CRB accept a lower price, and if so will there be rules to determine how low a price they will accept? Notably the achievement of full market value for the property may not be needed to show that the Model is proportionate.⁴⁶ However, an attempt to reach the best price achievable would be important in helping to demonstrate the proportionality of the interference. In any event presumably the sitting tenant could

⁴⁶ *James v UK* discussed at **5.1.(6)**. The Court said that a taking of property without an amount of compensation reasonably related to its value would normally be disproportionate. But Article 1 does not guarantee a right to full compensation in all circumstances: 'Legitimate objectives of 'public interest', such as are pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.' Para 54 This situation is not entirely analogous of course, but it does show some general measure of discretion open to the State.

refuse to sell at any point which may help avoid the problem that could be brought about by a forced sale well below market value. Nonetheless, if the prices available are so low that he feels he simply should not sell, and is not allowed to sell on the open market, this may be seen as interference with his right to dispose of his property, and at this point the necessity of Model 1 would have to be clearly demonstrated.

6.1.3 potential buyers and possible discrimination

It seems to be important to set out how the list of potential buyers will be drawn up by the CRB, setting out criteria for inclusion on the list and criteria for selection among potential buyers. Also, would the seller have any say in determining the purchaser?

In general, enjoyment of rights under the Convention must be secured without discrimination on any ground. If, in drawing up criteria for purchasers, there is a level of discrimination favouring for example local people, then it would be for the State to demonstrate the necessity of this were there to be a judicial review challenge from an unsuccessful applicant from another part of the country. Therefore, if any discriminating criteria for purchase is likely to be included, very careful consideration should be given to the necessity of this and explaining factually why this is justified.

6.1.4 Appeal

If there is a sense that a person's property rights are being interfered with then it is important that his civil rights provide some mechanism of challenge and that any tribunal that would hear such as appeal should be independent and impartial. The notion that such appeals be dealt with by the Land Court or similar body would seem appropriate to this end.

Some matters should be clarified. In particular, who will have this right of appeal: The sitting tenant in respect of the price paid by the CRB or other conditions of sale (if indeed the CRB pays a price, or merely holds the property pending transfer to the new tenant)? Disappointed prospective purchasers?

The provision of appeal here would certainly bolster the strength of the process and would help pre-empt possible judicial review actions by either the sitting tenant or a disappointed prospective purchaser. However, obviously there is a counter-side in that this could also be a costly and time-consuming mechanism which could interfere with the speedy transfer of property. There is a careful balance here. One might say that the more open, transparent and fair the decision-making of the CRB, the less likely would the need for appeal be, at least for disappointed prospective purchasers. They would still have the possibility of judicial review, but if the CRB works fairly there should be no reasonable prospect of this.

6.2 Model 2

Model 2 as it stands does not seem to present any challenges in terms of how it should be presented beyond those comments in 6.1 that might also be relevant. I would be happy to discuss the further development of Model 2 if it is pursued as an option.

6.3 Model 3

The comments in 6.1 in relation to Model 1 would also apply in relation to this Model.

6.4 Power of transfer of the croft to a new tenant

In the interests of proportionality it is essential to strike a fair balance between the interests of the community and the fundamental rights of the individual. The law at present creates procedures whereby tenants not resident on the croft or not working it are given six months to make representations before an order takes effect (Crofters (Scotland) Act 1993 s22(2)). This seems to offer the opportunity to resume residence and/or recommence work before the croft is transferred to another tenant. Also ejection can only be granted by a sheriff on application of the Crofters Commission: 1993 Act s22(3). Compensation can also be payable. These protections taken together would seem to be a proportionate way of dealing with the issue and this power has not to my knowledge faced successful challenge on human rights grounds to date.

6.5 Age-based prioritisation under Model 1

6.5.1 Prescribed by law?

If based on statute it would pass this test

6.5.2 Legitimate aim?

An aim that requires discrimination would have to be carefully framed to show exactly why this aim involves special treatment for younger people. One relevant aim as set out in the remit given to the Committee of Inquiry by the Scottish Executive announced in September 2006 **5.1.(5)** is ‘the market for crofts, in particular their availability for young people and new entrants.’ But why this is important should be explained further.

6.5.3 Necessary in a democratic society?

Since in cases of discrimination the approach of the European Court has typically been to assume that this is unnecessary unless the State can show that it is, and since the Court has also tended not to accord a margin of appreciation here, it will be challenging for the proposers of this measure to show that age is a relevant criterion in the award of grants. **Unless it can be shown that this is necessary and very carefully and proportionately tailored at a particular pressing public interest, then it could be subject to successful challenge.**

The Committee should also consider the prospect of the UK Parliament passing new law in due course that may outlaw discrimination on the grounds of age in the provision of goods and services, and the role of the Commission on Equality and Human Rights (CEHR) under the Equality Act 2006 in discouraging such discrimination.

Appendix 1: Relevant rights under the ECHR

Article 1 of Protocol No. 1:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’

Article 6 Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 8 Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14 Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

EU Charter of Rights

Art 17:

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject

to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.

2. Intellectual property shall be protected.

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 - 4.1.2.2 Tenants in certain circumstances.
 - 4.1.2.3 Only victims can bring a claim
 - 4.1.3 Who has duties?: ‘public authorities’
 - 4.1.4 Negative and positive obligations
- 4.2 Content of the Right to Property
 - 4.2.1 *Peaceful enjoyment of possession*
 - 4.2.2 *Deprivation of possessions*
 - 4.2.3 *Control*
- 4.3. Permissible interference by the state with the right to property
 - 4.3.1 How must these restrictions operate?
 - 4.3.1.1. Restrictions must be *prescribed by law*
 - 4.3.1.2 Restrictions to the right must be in pursuit of a *legitimate aim*
 - 4.3.1.3 Restrictions to the right must be *necessary in a democratic society*

Part 5. The compatibility of the three Models (1.2 and Appendix) with human rights law in Scotland

- 5.1 Model 1

- 5.1.(1) Is there an identifiable property right, or possession, in terms of Article 1?
- 5.1.(2) Will it be interfered with by the new law?
- 5.1.(3) Does the interference concern peaceful enjoyment of property, deprivation or control of use?
- 5.1.(4) Is the interference prescribed by law?
- 5.1.(5) Does the interference have a legitimate aim that is in the general interest?
- 5.1.(6) Is the interference necessary in a democratic society?

5.2. Model 2

- 5.2.(1) Is there an identifiable property right, or possession, in terms of Article 1?
- 5.2.(2) Would this be interfered with?
- 5.2.(3) Does the interference concern peaceful enjoyment of property, deprivation or control of use?
- 5.2.(4) Is the interference prescribed by law?
- 5.2.(5) Does the interference have a legitimate aim that is in the general interest?
- 5.2.(6) Is the interference necessary in a democratic society?

5.3 Model 3

- 5.3.(1) Is there an identifiable property right, or possession, in terms of Article 1?
- 5.2.(2) Has this been interfered with?
- 5.3.(3) Does the interference concern peaceful enjoyment of property, deprivation or control of use?
- 5.3.(4) Is the interference prescribed by law?
- 5.3.(5) Does the interference have a legitimate aim that is in the public or general interest?
- 5.3.(6) Is the interference necessary in a democratic society?

5.4 Two other issues arising from Models 1-3

5.4.1 Power of transfer of the croft to a new tenant

- 5.4.1.(1) Is there an identifiable property right, or possession, in terms of Article 1?
- 5.4.1.(2) Has this been interfered with?
- 5.4.1.(3) Does the interference concern peaceful enjoyment of property; deprivation; or control of use?
- 5.4.1.(4) Is the interference prescribed by law?
- 5.4.1.(5) Does the interference have a legitimate aim that is in the general interest?
- 5.4.1.(6) Is the interference necessary in a democratic society?

5.4.2 Age-based prioritisation under Model 1

5.4.2.1 Would such a measure be *prescribed by law*?

5.4.2.2 Would it pursue a *legitimate aim*?

5.4.2.3 Would such a measure be *necessary in a democratic society*?

Part 6. Clarifications/modifications that should be considered in respect of each Model

6.1 Model 1 recommendations

6.1.1 Model 1 – Good process, the composition of the CRB etc.

6.1.1.1

6.1.1.2

6.1.1.3

6.1.1.4

- 6.1.1.5
- 6.1.2 Sales and market value
- 6.1.3 Potential buyers and possible discrimination
- 6.1.4 Appeal

6.2 Model 2

6.3 Model 3

6.4 Power of transfer of the croft to a new tenant

6.5 Age-based prioritisation under Model 1

6.5.1 *Prescribed by law?*

6.5.2 *Legitimate aim?*

6.5.3 *Necessary in a democratic society?*

Appendix 1 relevant rights under the ECHR

Appendix 2 Full Table of Contents of report

Appendix 3: The Three Models

Appendix 3: The Three Models

Model 1: The locally elected body'

Under this model, sales and non-family assignments must pass through a locally elected body (CRB) which buys the croft or croft tenancy from the outgoing crofter and sells it on to a preferred purchaser. The purchaser is selected by staff from a list of people who have expressed an interest in acquiring a croft, according to a set of criteria agreed by the elected members. Should this applicant refuse the offer the croft will be offered to the next person prioritised on the list. While there would be national guidance, the criteria and the weights attached to them could differ from one crofting area to another to reflect local circumstances and traditions. The price would be set by the district valuer, based on the market value of the house and the agricultural value of the land or, for a tenancy, on the tenant's improvements (essentially the resumption price) – all subject to crofting regulation, of course.

Crofters would be expected to reside on the croft and work the land, or face resumption. Those failing to reside on the croft, assign the croft, or formally sub-let by a nominated deadline will lose their entitlement to the resumption price and their croft will be re-let. Similarly, neglected crofts will be resumed by the CRB and will be re-let. To facilitate intergenerational transfer, up to two houses would be permitted on each croft. It would be up to the CRB whether to suspend the crofters' right to buy in all or part of their area, according to the local circumstances.

Where the croft is assigned to a crofter aged under 40, the incoming crofter will be eligible for enhanced levels of CHGS to build an additional house for their own occupancy. Moreover, to assist the renovation of an empty house below the tolerable standard, the Scottish Government will offer to assist the costs of renovation with a Rural Empty Properties Grant provided that the house is then either occupied by the crofter for at least 15 years or let to a tenant nominated by the relevant Registered Social Landlord for an agreed period.

The CRB would have a strong development role as well as a regulatory function, working with groups of townships, modernised grazings committees and other stakeholders to develop strategic plans for crofting development, which would include identifying land for new crofts and for (non-croft) housing. Decrofting – primarily of common grazings - would only be possible in this plan-led manner. It is proposed that a 'sequential test' should be applied both by the CRB and the local planning authority, in which sites on croft inbye could only be developed where there are no suitable sites on non-croft land or on common grazings, and where this is in the community interest. Where such development is permitted, the development gain should be shared between the crofter, the landlord and the community (except where the landlord has failed to register croft boundaries with the CRB or CC).

Former local authority district and island authorities, or similar, might be an appropriate level at which the CRB would sit, and there would be a higher authority (possibly a small Crofters Commission or the Land Court) to which appeals on procedural grounds only would go. The CRB would comprise locally elected representatives, who would agree policies, including local crofting development plans, the criteria for croft allocation and policy on the right to buy, and staff would be employed to implement these policies. Budgets would flow from the Scottish Government but the CRBs would be autonomous NDPBs. The election process and

establishment of each CRB would ensure the interests of crofters, non-crofters and landowners are suitably represented and protected.

Model 2: ‘The dampened market’

Under this model, the market would operate freely, but legislative changes and tighter regulations would take the speculative element out of the market, thereby dampening it.

The facility to decroft would be tightly restricted, croft houses would have to be occupied and crofts worked. Crofts would be a minimum size to maintain the connection to working the land, and sub-divisions would only be permitted every ten years. Without the possibility of decrofting the speculative element of the market would largely be removed and it is envisaged that with tighter regulations on the habitation and use of crofts there would be less interest in acquiring crofts and the market could therefore be dampened.

The substantive difference between these models is the way in which crofts are allocated. Under the first, the locally elected body allocates the croft according to agreed criteria whereas under the second model there is no control, although the strict conditions would tend to preclude those who were not interested in working the land or living on the croft.

Model 3: ‘A restricted market’

Under this model, crofts exchange hands through a restricted market, in which only approved prospective purchasers can bid for assignments or ownership. Under this model, there would be either a local body or a centralised body, which would approve or reject prospective purchasers, but it would be a broker between seller and buyer rather than taking ownership of properties between transactions. This might remain susceptible to ‘cash under the table’. It would need to have transparent criteria on which basis prospective purchasers are rejected or approved, and there would probably need to be a right of appeal.